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13 **UNITED STATES DISTRICT COURT**

14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 UNITED STATES OF AMERICA,

16 Case No.: 12-CR-977-WQH

17 Plaintiff,

18 **Date: November 22, 2013**

19 v.

20 **Time: 10:00 a.m.**

21 BRANDON WILLIAM SCHROTH,

22 **UNITED STATES' SUPPLEMENTAL
BRIEFING REGARDING RESTITUTION**

23 Defendant.

24 COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and
25 through its counsel, LAURA E. DUFFY, United States Attorney, and
26 Andrew R. Haden, Assistant United States Attorney, and hereby
27 submits the Court-requested Supplemental Briefing Regarding
28 Restitution.

29 **I**

30 **STATEMENT OF THE CASE**

31 On November 29, 2012, Defendant Brandon William Schroth
32 ("Schroth") pled guilty to Counts 1, 2, 3, 4, 5, 6, 7, 9, 12, 13,
33 14, and 15 of the Superseding Indictment. All of the counts
34 related to the sexual exploitation and aggravated sexual abuse of
35 children.

1 Schroth's sentencing was originally scheduled for October 10,
2 2013. In preparation for sentencing, both parties filed sentencing
3 memorandums and sentencing summary charts. Doc. Nos. 36, 37, 55,
4 56. The United States also filed a sentencing memorandum related
5 to restitution. Doc. No. 63. Schroth filed an objection to the
6 restitution request. Doc. No. 65.

7 This Court held a status hearing related to restitution on
8 September 27, 2013. At the September 27th hearing, the Court
9 requested additional briefing by the United States in regards to 5
10 specific questions that it presented. An additional hearing
11 related to restitution was scheduled for November 22, 2013.

12

13

II

THE UNITED STATES' RESPONSE TO THE COURT'S REQUESTED BRIEFING

15 As mentioned above, the Court has requested supplemental
16 briefing by the United States in regards to restitution. Listed
17 below are the 5 specific questions presented by the Court, along
18 with the United States' responses.

19

20 1. Is restitution available for victim's that suffered psychological injuries without physical injuries?

21 Yes. Restitution is being sought pursuant to 18 U.S.C. §
22 2259. Compensable losses under section 2259 include the cost of
23 the victim's "medical services relating to physical, psychiatric,
24 or psychological care," 18 U.S.C. § 2259(b)(3)(A), and "physical
25 and occupational therapy or rehabilitation," id. § 2259(b)(3)(B);
26 see also United States v. Laney, 189 F.3d 954, 966-967 (9th Cir.
27 1999) (where the Ninth Circuit affirmed an award of future
28

1 counseling in relation to a sexual exploitation of a child). There
2 is nothing in the statute, or the relevant case law, to suggest
3 that a physical injury is a prerequisite to psychological care.

4 Indeed, the Ninth Circuit has explained that "[S]ection 2259
5 is phrased in generous terms, in order to compensate the victims of
6 sexual abuse for the care required to address the long term effects
7 of their abuse." Id. at 966.

8

9 **2. Is there sufficient evidence of causation?**¹

10 Yes. Although Section 2259 requires a "causal connection
11 between the offense of conviction and the victim's harm," id. at
12 965, the Ninth Circuit has affirmed that the causation
13 determination - as it relates to restitution in the child
14 exploitation context - is not a standard that should even approach
15 mathematical precision. United States v. Doe, 488 F.3d 1154, 1159-
16 1160 (9th Cir. 2007). Instead, a simple rule of reasonableness is
17 applied. Id. at 1160.

18 On appeal, the restitution award is reviewed under the abuse
19 of discretion standard and will be upheld "if the district court
20 was able to estimate, based upon facts in the record, the amount of
21

22 ¹ The Supreme Court has granted certiorari to address "What, if
23 any, causal relationship or nexus between the defendant's conduct
24 and the victim's harm or damages must the government or the victim
25 establish in order to recover restitution under 18 U.S.C. § 2259."
Paroline v. United States, 133 S.Ct. 2886 (June 27, 2013). That
26 case, however, deals with the causal relationship between
27 possessing child pornography downloaded from the internet and the
28 victims displayed in the images. Given the hands-on nature of
Schroth's conviction, the United States assumed that the Court was
asking a more specific question related to the causation between
the harm suffered and the various counseling costs being requested.

1 the victim's loss with some reasonable certainty." Id. at 1160-
2 1161.

3 For example, in Doe the Ninth Circuit affirmed an award of
4 restitution that included: two years' worth of psychological
5 treatment for each child victim; testing for sexually transmitted
6 diseases; costs for alternative education programs and vocational
7 training for the victims; and a management fee to a case worker at
8 the World Vision Foundation. Id. at 1161-1162.

9 In regards to psychological counseling, the Ninth Circuit has
10 previously upheld an award that included six years of future
11 counseling. Laney, 189 F.3d at 966-967. In Doe, the Ninth Circuit
12 also mentioned that the Seventh Circuit had upheld an award of
13 \$304,200 for *lifetime* counseling sessions. 488 F.3d at 11661;
14 citing United States v. Danser, 270 F.3d 451, 455-456 (7th
15 Cir.2001).

16 Returning to the instant case, it is absolutely reasonable to
17 link the victims' psychological injuries to the harms inflicted by
18 Schroth. The evidence provided indicates that the victims began
19 psychological counseling *after* they suffered the harms inflicted by
20 Schroth and *because* of the harms inflicted by Schroth. See Doc.
21 No. 63-2 at 2-3.

22 The amount of restitution is also reasonable. It is based, in
23 part, upon expenses that have already been incurred and verified by
24 the Tricare health insurance organization. See Doc. 63-3, 64-4,
25 63-5. This fact gives reasonable credibility to the dollar amounts
26 being requested, which is roughly half of the award affirmed in
27 Danser. 270 F.3d at 455-456.

1 The restitution request also covers past counseling sessions
2 and approximately three years of future counseling. That duration
3 is also reasonable. Phrased differently, a three-year duration is
4 similar to the two-year award affirmed in Doe, and is only half the
5 amount of time previously affirmed by the Ninth Circuit in Laney.

6

7 **3. Are the victim's parents and brother entitled to restitution?**

8

9 Yes, as to both. Admittedly, Ninth Circuit case law is
10 limited in this regard. Thankfully, the statute is explicit and
11 some other circuits have tangentially addressed the issue.

12 Section 2259 was intended to afford broad discretion to the
13 district court based upon the dynamic challenges and harms that
14 these types of crimes produce. It specifically defines victim to
15 include "in the case of a victim who is under 18 years of age... the
16 legal guardian of the victim... another family member, or any other
17 person appointed as suitable by the court...." 18 U.S.C. § 2259(c).

18 In interpreting the boundaries of Section 2259, the Seventh
19 Circuit explained that "it is clear that Congress intended to
20 provide victims of sexual abuse with expansive relief for 'the full
21 amount of ... [their] losses[.]" Danser, 270 F.3d at 455. When
22 children are harmed, it often impacts their guardians and others.

23 Accordingly, the Sixth Circuit wrote that "Section 2259(c)
24 acknowledges this reality in its inclusion of designated third
25 parties – who are not the direct victims of sexual exploitation but
26

1 who act on behalf of the exploited child – as “victims” who also
 2 may suffer harm as a result of the offense.” United States v.
 3 Evers, 669 F.3d 645, 656 (6th Cir. 2012)(where the court awarded
 4 lost wages to victim’s guardian because it was reasonably
 5 foreseeable that the parent or guardian of a minor victim of sexual
 6 exploitation will attend proceedings related to the prosecution of
 7 the case and, as a consequence, miss work.); see also United States
 8 v. Estep, 378 F.Supp.2d 763 (E.D.Ky. 2005)(where the court awarded
 9 restitution for divorce attorney’s fees, rent payments,
 10 transportation costs, counseling, and attorney’s fees related to a
 11 resulting civil case); United States v. Hayward, 359 F.3d 631 (3rd
 12 Cir. 2004)(where parents of minor victims were victims for purposes
 13 of the Mandatory Victims Restitution Act (MVRA), and thus entitled
 14 to restitution for reasonable costs in obtaining the return of
 15 their victimized children from London and in making their children
 16 available to participate in the investigation and trial pursuant to
 17 18 U.S.C.A. § 3663A(b)(4)).

20 As seen, an individual does not need to be directly harmed by
 21 the defendant to be entitled to restitution. The Ninth Circuit has
 22 endorsed this broad interpretation of Section 2259. As mentioned
 23 above, they affirmed an award of restitution to a case worker –
 24 that was not related to the child victims – at the World Vision
 25 Foundation. Doe, 488 F.3d at 1161-1162.

1 In this case, Schroth sexually harmed two little girls. Those
2 girls live with their parents (legal guardians) and their younger
3 brother (classified as either a family member or other suitable
4 persons pursuant to Section 2259(c)). Moreover, Schroth witnessed
5 the family dynamic and its members. Thus, it was reasonably
6 foreseeable that the harms inflicted would emotionally damage the
7 entire family. That reality is affirmed by the evidence that the
8 entire family has already attended counseling related to Schroth's
9 criminal conduct, and that they intend to do so in the future.

10 Doc. No. 63-2.

11 In sum, the United States has not been able to find any cases
12 that directly affirmed a restitution award for counseling services
13 for a parent or a sibling of a direct victim. But the statute and
14 the relevant case law supports third-party restitution and the
15 broad interpretation of Section 2259. As such, the United States
16 believes that this Court can, and should, award restitution to the
17 parents and younger brother of the girls that were directly harmed
18 by Schroth.

19 A contrary determination would potentially imply that it was
20 unreasonable or unnecessary for the family to seek counseling after
21 suffering such a traumatic abuse, or that it would be unforeseeable
22 that inflicting such harms could have that result.

23 //

24 //

4. Are other victim's (specifically those named in Cts 9, 12, 13) seeking mandatory restitution?

No. The assigned Victim-Witness Specialist from the U.S. Attorney's Office ensured that the victim related to Counts 9, 12, and 13 was made aware of the status of this case and impending deadlines in regards to sentencing/restitution. That victim has not responded to our communications. As such, the United States has not requested restitution for that victim. See PSR at 6 ¶ 17 (describing victim 4, who relates to Cts 9, 12, 13). The victim's discussed in the above sections were victims 1 and 2. PSR at 5 ¶ 8.

5. Are the victims in Counts 14 and 15 the same as Counts 1-7?

Yes. The victims are the same. Those counts simply relate to a different statutory charge.

III

CONCLUSION

For the above stated reasons, the United States respectfully requests that the Court order the restitution being requested.

DATED: October 24, 2013

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

/s/ Andrew Haden
Andrew R. Haden
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Case No.: 12-CR-997-WQH

Plaintiff,

CERTIFICATE OF SERVICE

v.

BRANDON WILLIAM SCHROTH,

Defendant

IT IS HEREBY CERTIFIED THAT:

I, ANDREW HADEN, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' UNITED STATES' SUPPLEMENTAL BRIEFING REGARDING RESTITUTION, together with memorandum of points and authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Ricardo Nicol, Esq.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2013

s/Andrew Haden
ANDREW R. HADEN